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Subject Independent Record (AP): Grace to test science of asbestos
claims

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Independent Record: Grace to test science of asbestos claims

By PEG BRICKLEY - Associated Press - 1/4/08

PHILADELPHIA — W.R. Grace & Co. is getting ready to gamble the company on the decision of a lone bankruptcy judge who will take up a question that would otherwise be in the hands of an army of judges and jurors.

The question set for trial this month is how much the Columbia, Md.-based specialty chemical company owes for injuries, death and other damage linked to its asbestos products. The trial will begin Jan. 14 in a Delaware bankruptcy court and will produce the number that will be the core of Grace's Chapter 11 exit plan.

If the answer from U.S. Bankruptcy Judge Judith Fitzgerald is \$700 million or a little more, Grace and its shareholders are safe and on their way out of bankruptcy, with enough value to cover the asbestos damage bill and have something left over for shareholders.

But if Fitzgerald estimates asbestos liabilities at \$2 billion or \$3 billion or more, Grace is destined to become the property of people damaged by its toxic products, and shareholders will be out in the cold.

Experts for the asbestos camp say Grace's liabilities are at least \$3.7 billion. "If the asbestos experts are even close to right, then the equity in this company is severely at risk, or it will simply be wiped out," said Roger Frankel, a lawyer for asbestos creditors.

Investors are betting heavily that Grace — bankrupt for more than six years and under criminal indictment in Montana for allegedly covering up its asbestos troubles — will be the Chapter 11 case where phony claims are finally exposed, and "junk science" trashed.

Speculators pounce on every court filing, and are paying about \$25 per share for the stock — an unusually high amount for a company in bankruptcy.

Dozens of major companies crashed into Chapter 11 in the past decade, in an effort to resolve daunting asbestos liabilities. Most have since exited bankruptcy after more limited estimation proceedings focused on their track record in defeating or paying claims. Grace is the only company to insist on estimation proceedings that resemble a mass tort trial.

"Grace is the last circumstance in which a bankruptcy court has the ability to say which claims are

good and which claims are bad," said David Bernick, a lawyer with Kirkland & Ellis.

Asbestos lawyers say the company is trying to convert a forum that was intended to promote negotiation into a platform for eliminating vast numbers of asbestos-injury claims.

If Grace gets its way, thousands of people who would be entitled to press their claims before a hometown judge and jury will instead have their fates determined in a faraway bankruptcy courtroom.

"What Grace is trying to do in the estimation proceeding is to say that the tort system is broken and we are going to ask the bankruptcy court to determine these claims on their merits," said Daniel Cohn, who represents some of Grace's asbestos creditors. He is with the Cohn Whitesell and Goldberg law firm in Boston.

Deals, not trials, are the norm in Chapter 11, according to Loyola Law School professor Georgene Vairo, an authority on resolving mass torts through bankruptcy. "The use of bankruptcy courts to achieve 'global peace' especially in the asbestos context, has become relatively routine," Vairo said.

Bernick said Grace may get to a deal sooner or later, and that the estimation proceeding will not trespass on individual jury-trial rights. But the company is intent on invoking medical evidence to test the overall validity of claims. Bernick said the data Grace will use in its estimation proceeding is "more detailed and different in kind" than evidence used in prior asbestos-liability estimation proceedings.

Grace and its shareholders say the company is solvent and capable of paying valid asbestos claims in full. But attorneys for asbestos plaintiffs say that assertion is belied by the company's six-year stay in bankruptcy.

"If the (company) and equity holders really believe that, what are we doing here?" asbestos attorney Frankel asked at a court hearing recently.

Bankruptcy offers a way out for corporations that were taking a beating in scorched-earth litigation. If Grace feels confident it can defeat claims in the tort system outside Chapter 11, Frankel said, that is what it should do.